APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 18, 2007

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 05-55364

ANDREW J. ORKIN; F. MARK ORKIN; SARAH-ROSE JOSEPHA ADLER; A. HEINRICH ZILLE,

Plaintiffs-Appellants,

v.

ELIZABETH TAYLOR,

Defendant-Appellee.

Argued and Submitted Feb. 12, 2007
Filed May 18, 2007

Before: WILLIAM C. CANBY, JR. and SIDNEY R. THOMAS, Circuit Judges, and SUZANNE B. CONLON,* District Judge.

THOMAS, Circuit Judge.

Descendants of Jewish art collector Margarete Mauthner (collectively, "the Orkins") claim that their ancestor was

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* The Honorable Suzanne B. Conlon, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

wrongfully dispossessed of a painting during Hitler's Nazi regime, entitling them to ownership of the painting, which was later purchased by actress Elizabeth Taylor. In this appeal, we conclude that the Holocaust Victims Redress Act does not create a private right of action and that the Orkins' state law claims are barred by the statute of limitations. We affirm the judgment of the district court, dismissing the complaint.

I

Vincent van Gogh is said to have reflected that "paintings have a life of their own that derives from the painter's soul." The confused and perhaps turbulent history of his painting *Vue de l'Asile et de la Chapelle de Saint-Rémy* may prove the truth of his observation.

In 1889, a few months after cutting off the lower part of his left ear following a dispute with Paul Gauguin, van Gogh entered the Saint-Paul-de-Mausole asylum near the town of Saint-Rémy-de-Provence. During this period of his life, he produced over 150 paintings, including some of his most famous works, such as *The Starry Night.* In the summer or fall of 1889, he painted *Vue de l'Asile et de la Chapelle de Saint-Rémy*, which may have been part of a series that he described to his brother Theo as "Sketches of Autumn." The painting portrays either the Church of Labbeville near the town Auvers, a few miles from the asylum, or a monastery that was part of the asylum. Within a year of completing the painting, van Gogh died from a self-inflicted gunshot wound.

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Van Gogh sold only one painting during his lifetime. Since his death, however, his works have indeed had lives of their own. After Vincent's death in 1890, and his brother Theo's death six months later, ownership of *Vue de l'Asile et de la Chapelle de Saint-Rémy* passed to Theo's widow, Johanna. The German art dealer Paul Cassirer, an early promoter of the works of van Gogh and other post-impressionist artists, purchased the painting in 1906 or 1907. Shortly thereafter, Cassirer sold the picture to Margarete Mauthner, an early collector of van Gogh's works. The parties vigorously dispute the circumstances under which Mauthner parted with the painting, and that dispute forms the basis of the current controversy between the parties. We need not, and we do not, resolve those factual disputes in this appeal because the issues before us are purely legal in nature. However, a description of the general factual background of the case-highlighting where appropriate the factual disputes-is helpful to frame the legal issues presented.

One of the tools used by art historians to trace ownership is an artist's *catalogue raisonné*. A *catalogue raisonné* is an annotated, illustrated book of a particular artist's works, usually prepared by art historians, scholars, and dealers, which constitutes "a definitive listing and accounting of the works of an artist." *DeWeerth v. Baldinger*, 836 F.2d 103, 112 (2d. Cir. 1987). A *catalogue raisonné* published in 1928, *L'oeuvre de Vincent Van Gogh Catalogue Raisonné*, shows Margarete Mauthner as the owner of the painting. J.B. de la Faille's *catalogue raisonné* of van Gogh, published in 1939, also identifies Mauthner as the owner.

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From the time of Adolf Hitler's election as Chancellor of Germany in 1933 until the end of World War II, Hitler's Nazi regime engaged in a systematic effort to confiscate thousands of works of art throughout Europe. Hector Feliciano, *The Lost Museum: The Nazi Conspiracy to Steal the World's Greatest Works of Art* 3 (Basic Books 1997). Within Germany, the enactment of the Ordinance for the Attachment of the Property of the People's and State's Enemies and the Ordinance for the Employment of Jewish Property gave Nazi officials the authority to seize artwork from Jewish owners under color of law. Jonathan Petropoulos, *Art as Politics in the Third Reich* 190 (University of North Carolina Press 1996).

As the Nazis' persecution accelerated, Mauthner fled Germany to South Africa in 1939, leaving her possessions behind. She remained there until her death in 1947, at the age of 84. What happened to *Vue de l'Asile et de la Chapelle de Saint-Rémy* during that time is not clear from the record. A 1970 *catalogue raisonné* prepared by a committee of scholars in the Netherlands lists the next owner as Alfred Wolf, a Jewish businessman who left Germany for Switzerland in 1934 and ultimately relocated to South America. The auction catalogue prepared by Sotheby & Co. in 1963 lists the provenance, or chain of title, as including three owners prior to Wolf. The Sotheby's catalogue traces the ownership of the painting from Mauthner to Paul Cassirer, to Marcel Goldschmidt, and then to Alfred Wolf. The Orkins contend that this chain of ownership cannot be correct because Paul Cassirer had committed suicide in 1926, two years before the 1928 *catalogue raisonné* was published, listing Mauthner as the owner.

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Notably, the Orkins do not contend that the painting was confiscated by the Nazis. Rather, they allege economic coercion, contending that Mauthner sold the painting "under duress." They note that laws promulgated by the Allied Forces after the conclusion of World War II established a presumption that any transfer or relinquishment of property by a persecuted person within the period January 30, 1933 to May 8, 1945 was an act of confiscation. Military Government Law No. 59 § 375(b).

Taylor contends that, at best, the record shows that the painting was sold through two Jewish art dealers to a Jewish art collector, with no evidence of any Nazi coercion or participation in the transactions.

In short, the parties agree that Mauthner once owned the painting and that it was later possessed by Alfred Wolf. At this point in the development of the case, the rest of what transpired with the painting during the 1930s in Berlin is clouded in uncertainty. Sometime in the early 1960s, the Estate of Alfred Wolf commissioned Sotheby's to sell by auction a number of Impressionist and Post-Impressionist paintings, including *Vue de l'Asile et de la Chapelle de Saint-Rémy.*

With the help of her father, who was an art dealer, Elizabeth Taylor began collecting art in the 1950s, acquiring works of Degas, Renoir, Pissarro, Monet, Cassatt and other prominent artists. She had long wanted to acquire a van Gogh. While living in London with her husband, Richard Burton, Taylor learned that *Vue de l'Asile et de la Chapelle de Saint-Rémy* would be offered at a Sotheby's auction in April 1963.

She authorized her father to bid for her at the auction, and he was successful in purchasing the painting on her behalf for £ 92,000.

Taylor's acquisition was publicized at the time. Subsequently, the 1970 *catalogue raisonné* referenced Taylor's ownership. From November 1986 until March 1987, the painting was exhibited publicly at the Metropolitan Museum of Art in New York, in an exhibition entitled *Van Gogh in Saint Rémy and Auvers.*

In 1990, Taylor offered the painting for sale through Christie's auction house in London. The provenance for the sale lists Taylor as the current owner, with the prior owners being Alfred Wolf (of Stuttgart and Buenos Aires), Marcel Goldschmidt & Co. (of Frankfurt), Margarete Mauthner (of Berlin), Paul Cassirer (of Berlin), and Johanna van Gogh-Bonger (of Amsterdam). The work did not sell at the auction.

In 1998, Congress enacted three statutes pertaining to victims of Nazi persecution: the Holocaust Victims Redress Act ("Act"), Pub.L. No. 105-158, 112 Stat. 15 (1998), the Nazi War Crimes Disclosure Act of 1998, Pub.L. No. 105-167, 114 Stat. 2865 (1998), and the United States Holocaust Assets Commission Act of 1998, Pub.L. No. 105-186, 112 Stat. 611 (1998). The Orkins allege that their inquiry into whether their ancestor, Mauthner, may have lost her art collection due to Nazi persecution began upon the passage of these acts. They retained a law firm in 2001 and claim that, until their attorneys completed their investigation, they did not discover the basis of their current claim. The Orkins allege that, before they began that investigation, they did not

know that Mauthner had owned *Vue de l'Asile et de la Chapelle de Saint-Rémy*, that she had lost the painting as a result of Nazi persecution, that Taylor had bought the painting, or that there was a legal basis for recovering the painting. They also claim that they first learned of Taylor's ownership in 2002, through a rumor on the internet that Taylor was interested in selling the painting.

In December 2003, the Orkins wrote a letter to Taylor, demanding that she return the painting to them. After some discussion of settlement, Taylor wrote a response letter declining settlement and asserting that the Orkins' claim to the painting was untimely. Taylor then filed a complaint for declaratory relief to establish her title.

In 2005, the Orkins filed their First Amended Complaint for recovery of the painting under theories of specific recovery, replevin, constructive trust, restitution, and conversion. The district court dismissed the complaint, concluding that the state-law actions were time-barred and that the federal statute did not create a private right of action. Because there is complete diversity between the parties and because the painting is worth more than $75,000, the district court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291, and we review *de novo* the district court's dismissal of the complaint pursuant to Rule 12(b)(6). *Cervantes v. United States*, 330 F.3d 1186, 1187 (9th Cir.2003).

Because the district court dismissed this case on a Rule 12(b)(6) motion, we must assume that all facts stated in the complaint are true and that they are provable by admissible

evidence. Although the parties vigorously dispute whether the painting was effectively confiscated by the Nazis through forced sale or was legitimately sold through Jewish art dealers, we need not resolve that issue. We assume, for the purposes of our discussion, that the allegations of the complaint are true and that Mauthner was coerced into giving up the painting before she left Germany.

II

The district court properly dismissed the Orkins' federal claims on the ground that the Holocaust Victims Redress Act did not create a private right of action against private art owners. In determining whether a federal statute creates a private right of action, congressional intent is the cornerstone of the analysis. The Supreme Court has established a four-factor test for discerning whether a statute creates a private right of action. *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Under that test, we must ask: (1) whether the plaintiff is a member of a class that the statute especially intended to benefit, (2) whether the legislature explicitly or implicitly intended to create a private cause of action, (3) whether the general purpose of the statutory scheme would be served by creation of a private right of action, and (4) whether the cause of action is traditionally relegated to state law such that implication of a federal remedy would be inappropriate. 422 U.S. at 78, 95 S.Ct. 2080.

The most important inquiry under *Cort* is the second factor: whether there is "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one." *Opera Plaza Residential Parcel Homeowners Assn. v.*

Hoang, 376 F.3d 831, 834-35 (9th Cir.2004) (quoting *Cort*, 422 U.S. at 78, 95 S.Ct. 2080); *First Pacific Bancorp, Inc. v. Helfer*, 224 F.3d 1117, 1121-22 (9th Cir.2000) (same). Indeed, the three *Cort* questions that are not explicitly focused on legislative intent are actually indicia of legislative intent, such that the *Cort* test itself is focused entirely on intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). The four *Cort* factors, thus, are merely targeted inquiries to guide our central project of discerning Congress's intent. *Id.*

The plain text of the Holocaust Victims Redress Act leaves little doubt that Congress did not intend to create a private right of action. The Orkins rely on § 202 of the Act, entitled "Sense of the Congress Regarding Restitution of Private Property, Such as Works of Art." That section reads in its entirety as follows:

> It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

Act § 202, 112 Stat. at 17-18.

"Sense of the Congress" provisions are precatory provisions, which do not in themselves create individual rights or, for that matter, any enforceable law. *Yang v. Cal.*

Dept. of Soc. Servs., 183 F.3d 953, 958-59 (9th Cir.1999). Although "sense of the Congress" provisions are sometimes relevant to our determination of whether other mandatory provisions create private rights of action, *id.* at 959 & n. 4, the Orkins can point to no provision of the Act or of any of its companion legislation that can fairly be characterized as mandatory. There is simply no "right- or duty-creating language" anywhere in the statutory scheme, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and § 202's announcement of a "sense of the Congress" cannot, of its own force, imply a private right of action, *Yang*, 183 F.3d at 958-59.

Additionally, the Act's legislative history indicates that even its most ardent supporter did not intend for the bill to create a private right of action. Rather, the legislative intent was to encourage state and foreign governments to enforce existing rights for the protection of Holocaust victims. The sponsor and primary champion of the legislation, Representative Jim Leach (R-IA), believed that existing law would suffice to restitute Nazi-stolen artworks to their Nazi-era owners. At a hearing that occurred after passage of the Act, Representative Leach noted the possibility that new "domestic legislation" might assist in restitution of stolen art, but he went on to conclude that "Congress may have gone as far as it appropriately should on this subject in the Holocaust Victims Redress Act." *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998). That statement strongly implies, consistently with the precatory language of the legislation itself, that the Act was a limited bill, passed with an understanding of constitutional

limitations on congressional power. The second *Cort* factor, thus, does not support the Orkins' claim; the bill simply did not intend to create a private right of action.

Examination of the remaining *Cort* factors buttresses this conclusion. With respect to the first *Cort* factor, although there is no doubt that the Act was focused on Holocaust victims and (in a colloquial sense) intended to benefit them, Holocaust victims do not constitute a "beneficiary class" within the meaning of the *Cort* test. The provision's focus is on "governments" rather than individuals, urging those governments "to facilitate" enforcement of preexisting property rights. Act § 202, 112 Stat. at 17-18. The statute, thus, does not "explicitly confer[ ] a benefit on" Holocaust victims; it merely expresses Congress's sense that Holocaust survivors and heirs should benefit fully from preexisting protections. *Cf. Cannon*, 441 U.S. at 693-94, 99 S.Ct. 1946 (concluding that the first *Cort* factor was met because the statute at issue "explicitly confers a benefit on" an identifiable class and because the plaintiff was a member of that class). The Orkins, thus, are not members of a class that Congress "intended to benefit," as that phrase is used in *Cort*.

With respect to the third *Cort* factor, the text and history of the legislation reveal that its overarching purpose was not to provide for private litigation. Rather, the general purpose of the statutory scheme was to fund research efforts and to declassify records, while simultaneously encouraging foreign governments, as well as public and private institutions, to do likewise. In other words, the motivating concern was *not* access to courts; it was access to information. In fact, throughout the committee hearings, witnesses testified that

courts would likely do a poor job of resolving Holocaust victims' claims. Specifically, the committee heard testimony that the difficulties of tracing information would likely preclude effective judicial resolution of discrete claims, and several museum directors testified that alternative fora such as mediation and arbitration were preferable to litigation. *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998) (testimony of Philippe de Montebello, director of the Metropolitan Museum of Art). The general purposes of the statute, therefore, do not support the conclusion that Congress intended to provide a private right of action in this case.

Finally, with respect to the fourth *Cort* factor, there can be no doubt-as this case amply demonstrates-that state law provides causes of action for restitution of stolen artworks. Furthermore, the torts asserted here are undoubtedly causes of action that are traditionally relegated to state law. Implication of a federal remedy in this case, therefore, would be inappropriate under the fourth *Cort* factor. Representative Leach's statement that "Congress may have gone as far as it appropriately should" when it passed the Act strongly supports the conclusion that Congress did not intend to supersede traditional state-law remedies when it passed the Act. *Holocaust Victims' Claims, Hearing before the House Committee on Banking and Financial Services*, 105th Cong., 2d Sess. (1998).

In short, the Act does not satisfy any of the *Cort* factors; none of the relevant indicia of intent supports the conclusion that Congress intended to create an implied private right of

action in this case. The Act is a precatory announcement of the "sense of the Congress," which neither confers rights nor creates duties. Given the absence of congressional intent to create a private right of action, the Orkins' assertion of a federal right of action must fail.

III

The district court also properly concluded that the Orkins' state-law claims were time-barred. California provides a three-year statute of limitations for any action arising from the "taking, detaining, or injuring" of any "goods or chattels." Cal.Civ.Proc.Code § 338(c). In 1983, the statute of limitations was amended to specify that a "discovery rule" governs accrual of causes of action for recovery of "any article of historical, interpretive, scientific, or artistic significance." *Id.* In other words, under the new law, an action for recovery of artwork accrues when the rightful owner discovers the whereabouts of the artwork. Before 1983, the statute did not specify when a cause of action for theft would accrue.

The Orkins do not argue that the 1983 amendment applies retroactively to their allegations of a 1939 theft and a 1963 conversion. Rather, they contend that the discovery rule applies even under pre-1983 law, citing an intermediate appeals court decision that so held. *Naftzger v. Am. Numismatic Soc'y*, 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784 (1996).

"The task of a federal court in a diversity action is to approximate state law as closely as possible in order to make

sure that the vindication of the state right is without discrimination because of the federal forum." *Ticknor v. Choice Hotels Intern., Inc.*, 265 F.3d 931, 939 (9th Cir.2001) (quoting *Gee v. Tenneco, Inc.*, 615 F.2d 857, 861 (9th Cir.1980)). If the state's highest appellate court has not decided the question presented, then we must predict how the state's highest court would decide the question. *Id.* In doing so, we take state law as it exists without speculating as to future changes in the law. *Id.*

The California Supreme Court has never confronted the question of what rule governs accrual of pre-1983 causes of action for theft and conversion. The California Supreme Court has, however, specifically held that the discovery rule, whenever it applies, incorporates the principle of constructive notice. In *Jolly v. Eli Lilly & Co.*, the California Supreme Court held that, under California's discovery rule, "[a] plaintiff is held to her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her." 44 Cal.3d 1103, 1109, 245 Cal.Rptr. 658, 751 P.2d 923 (1988). In other words, under the discovery rule, a cause of action accrues when the plaintiff discovered *or reasonably could have discovered* her claim to and the whereabouts of her property. In assessing California law, we conclude that it is highly unlikely that the California Supreme Court would abandon the *Jolly* rule, much less adopt a new rule that eschewed the concept of constructive notice.

Under *Jolly*, the latest possible accrual date of the Orkins' cause of action was the date on which they first reasonably could have discovered, through investigation of sources open to them, their claim to and the whereabouts of the van Gogh

painting. From the face of the Orkins' complaint, it is apparent that Taylor's acquisition of the painting was certainly discoverable at least by 1990, when she held it out for sale in an international auction, and most probably as early as 1963, when she acquired the painting in a highly publicized international auction. In fact, the complaint alleges-and demonstrates by attachment-that Taylor bought the painting at a publicized auction in 1963, that Taylor was listed as the owner of the painting in a publicly available 1970 *catalogue raisonné*, and that Taylor publicly offered the painting for sale in 1990. Had the Orkins investigated any of those publicly-available sources, they could have discovered both their claim to the painting and the painting's whereabouts long before the 2002 internet rumor was posted.

We therefore affirm the district court's conclusion that the Orkins' state-law claims are time-barred. Even under the most generous possible rule for accrual of the causes of action, the claims expired in or before 1993-three years after the last public announcement of Taylor's ownership. The district court correctly held that the Orkins' state law claims were untimely filed.

IV

Congress did not create a private right of action in passing the Holocaust Victims Redress Act, which merely reflected the sense of Congress. The Orkins' state law claims are time-barred. The district court was entirely correct in dismissing the complaint. We need not, and do not, reach any of the other issues urged by the parties.

AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED FEBRUARY 2, 2005

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 04-8472-RGK(FMOX)

SARAH-ROSE JOSEPHA ADLER, *et al.*

v.

ELIZABETH TAYLOR

February 2, 2005

CIVIL MINUTES-GENERAL

Present: The Honorable
R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Proceedings: (IN CHAMBERS)
DEFENDANT ELIZABETH TAYLOR'S MOTION TO DISMISS (DE 5)

I. INTRODUCTION

The issue in this case is the rightful ownership to "Vue de l'Asile et de la Chapelle de Saint-Remy," ("the painting") which Vincent Van Gogh painted while a patient of the asylum at Saint-Remy. Plaintiffs are heirs and descendants of an art collector who owned the painting in early twentieth-century Germany. In 1963, Elizabeth Taylor ("Taylor")

bought the painting at an auction in England. Plaintiffs are essentially suing for four claims: replevin, constructive trust, restitution, and conversion. Plaintiffs complicate matters by bringing these four claims in four alternate forms: (1) generally, for "recovery of the painting" under an action implied by federal law; (2) for these four claims individually under an action implied by federal law; (3) for these four claims as implied by the "findings and declarations of the California legislature"; and (4) for these four claims in their traditional form, under California law. Essentially, Plaintiffs argue that the painting rightfully belongs to them because it was stolen from their heir through Nazi persecution. Taylor moves to dismiss for failure to state a claim. For the following reasons, the Court grants Taylor's motion.

For the purposes of this Motion, the Court must consider all facts alleged in the First Amended Complaint to be true. Plaintiffs' are descendants and heirs of the late Margarete Mauthner, who bought the painting in 1914 in Germany. Mauthner owned the painting through the 1920s and 1930s. Mauthner and her family fled Nazi Germany for South Africa in 1939. The painting was lost to Nazi persecution. Mauthner died in South Africa in 1947. She was eighty-four.

Taylor bought the painting in 1963 at a Sotheby's auction. The Sotheby's auction incorrectly stated that the painting had passed to Paul Cassirer in 1928 (he had died in 1926). The Sotheby's auction also referred bidders to two catalogues raisonné, which listed the history of the painting. This history of ownership identified Mauthner as the owner of the painting in the 1920s and 1930s, and included that she lived in Berlin. It included other information inconsistent with the Sotheyby's

auction's representations. Plaintiffs allege that Taylor ignored these warning signs and bought the painting without properly investigating its ownership history.

In the late 1990's and early in this decade, Congress and the California legislature both stated a strong public policy favoring the return of property that the Nazi government had stolen. Plaintiffs then became aware of the possibility that Mauthner owned the painting and that it may have been stolen from her. After some investigation, Plaintiffs brought the present action.

II. JURISDICTION

A. Diversity Jurisdiction

Diversity jurisdiction clearly exists in this case. Plaintiffs are all foreign citizens, while Defendant is a California resident. The painting is worth well over $75,000. Therefore, the Court properly has jurisdiction over the case pursuant to 28 U.S.C. § 1332.

B. Federal Question Jurisdiction

Some of Plaintiffs' claims are purportedly brought under the 1998 Holocaust Victims Redress Act ("HVRA"), Pub.L. No. 105-158, 112 Stat. 15 (1998), and its companion Nazi War Crimes Disclosure Act ("Disclosure Act"), Pub.L. No. 105-567, 114 Stat. 2865 (1998). Plaintiffs ask the Court to find that these grant the Court federal question jurisdiction. Such a determination is unnecessary because the Court already has jurisdiction pursuant to § 1332. Therefore, the Court need not reach the question of whether federal question jurisdiction applies to this case.

Appendix B

III. JUDICIAL STANDARD

In considering a motion to dismiss for failure to state a claim pursuant to Federal Rules of Civil Procedure 12(b)(6), the Court must assume the plaintiff's allegations are true, and must construe the complaint in a light most favorable to the plaintiff. *See United States v. City of Redwood City*, 640 F.2d 963, 967 (9th Cir.1981). The sole issue raised by such a motion is whether the facts pleaded would, if established, support a valid claim for relief. Thus, the facts alleged, no matter how improbable, must be accepted as true for purposes of the motion. *See Neitzke v. Williams*, 490 U.S. 319, 328-329, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). However, a court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *See W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir.1981). Upon review of a complaint, a court may not dismiss pursuant to Rule 12(b)(6) "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Russell v. Landrieu*, 621 F.2d 1037, 1039 (9th Cir.1980). However, dismissal is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation. *See North Star Int'l v. Ariz. Corps. Comm'n*, 720 F.2d 578, 583 (9th Cir.1983).

The court cannot consider material outside the complaint unless it converts the Rule 12(b)(6) motion into a summary judgment motion. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001). For purposes of a

Rule 12(b)(6) motion, the court may consider material properly submitted with the complaint. *See Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir.1989). Furthermore, the court may also consider matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Id.* at 1555.

If the court chooses to dismiss the complaint, it must decide whether to grant leave to amend. Courts grant leave to amend unless it is clear that amendment would be futile, and "that the deficiencies of the complaint could not be cured by amendment." *Noll v. Carlson*, 809 F.2d 1446, 1448 (9th Cir.1987).

IV. DISCUSSION

A. Plaintiffs' Traditional State Law Claims

Before reaching Plaintiffs' non-traditional claims (that arise out of federal law or out of the California legislature's findings and declarations), the Court will first determine whether the Complaint's traditional claims can survive the motion to dismiss. Taylor argues that these claims should be dismissed because they are time-barred under California. Plaintiffs argue that the discovery rule delayed the statute of limitations from running until recently. For the following reasons, the Court finds that Plaintiffs' Complaint establishes facts that show the statute of limitations began to run in 1963 and bars their claims.

Appendix B

1. Plaintiffs' First Amended Complaint States a Prima Facie Case

Plaintiffs allege traditional state law claims for conversion, replevin, constructive trust, and restitution. Essentially, Plaintiffs allege (1) that they, through their heir, are the rightful owner of the painting, (2) that the Nazi government's persecution resulted in their loss of the painting, and (3) that Taylor wrongfully took possession of the painting either knowing of its likely theft, or at least that she failed to reasonably investigate its possible theft.

Generally, Plaintiffs' state law claims are valid and supported by the Complaint. First, Plaintiffs can prove conversion by showing (1) that Plaintiffs have ownership or a right to possession of the painting; and (2) that Taylor wrongfully appropriated or exercised dominion over the painting. *See Dodge v. Meyer*, 61 Cal. 405, 406-07 (1882); *Oakdale Vill. Group v. Fong*, 43 Cal.App.4th 539, 540-41, 50 Cal.Rptr.2d 810 (1996). Here, Plaintiffs' alleged facts, if proven, would demonstrate that Plaintiffs' (through their heir) had rightful ownership to the painting, and that Taylor took exclusive control of the painting in 1963 either knowing that it was stolen or negligently failing to investigate its ownership history. Alternatively, Plaintiff's alleged facts could establish that they are the rightful owners and that Taylor, although she lawfully purchased the painting, is liable for conversion arising out of her refusal to return it. *See Edwards v. Jenkins*, 214 Cal. 713, 720, 7 P.2d 702 (1932). Plaintiffs' allegations sufficiently state a claim for conversion under California law.

Second, replevin is a common law remedy that permits the prevailing party to recover both personal property and incidental damages from an unlawful possessor. *See* 66 Am.Jur.2d Replevin § 1 (2004). In federal courts, replevin is a remedy specifically approved by rule, as governed by the appropriate state law. *See* Fed.R.Civ.P. 64; *Granny Goose Foods, Inc. v. B'hd of Teamsters and Auto Truck Drivers Local No. 70*, 415 U.S. 423, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974). In California, courts allow for specific recovery of personal property and incidental damages (but use the term "claim and delivery" rather than "replevin"). *See Fran-Well Heater Co. v. Robinson*, 182 Cal.App.2d 125, 5 Cal.Rptr. 900 (1960); Cal. Civ.Code § 3379; Cal.Code Civ. P. § 511.010 *et seq.* For specific recovery, Plaintiffs only need show (1) a right to possession of the property, and (2) Taylor's wrongful possession. *Id.* Stated more simply, specific recovery is an available remedy for conversion. Because the Complaint supports a conversion claim, it also supports a specific recovery remedy.

Third, a constructive trust is an equitable remedy used to compel a person holding property to transfer it to the person entitled to possession. *See* Cal. Civ.Code §§ 2223, 2224; *Haskel Engineering & Supply Co. v. Hartford Acc. & Indem. Co.*, 78 Cal.App.3d 371, 375, 144 Cal.Rptr. 189 (1978); B.E. Witkin, *Summary of California Law* § 305 (9th ed. 1990 & Supp.2004). For a court to create a constructive trust, the plaintiff only needs to show that (1) the defendant wrongfully acquired the property, and (2) that the defendant would be unjustly enriched if allowed to keep the property. *Id.* Again, for the same reasons discussed above, Plaintiffs' Complaint alleges facts that support both elements necessary for a constructive trust.

Finally, Plaintiffs allege a claim for restitution. However, in California, the restitution remedy is only applicable to breach of contract claims. *See Freedman v. St. Matthias Parish,* 37 Cal.2d 16, 230 P.2d 629 (1951). Here, Plaintiffs' "restitution" claim is better termed a demand for specific recovery and any incidental damages, which are already properly alleged in the preceding three claims.

In summary, regardless of whether Plaintiff's non-traditional claims are valid, at the very least their First Amended Complaint sufficiently alleges a claim for conversion, and demands valid remedies of specific recovery and a constructive trust.

2. California's Statute of Limitations

Taylor alleges that the Complaint does not state a claim because of California's statute of limitations. Plaintiffs argue that the statute did not begin tolling against them until recently.

California limits causes of action to recover Holocaust-era artwork from individuals. California passed a law giving heirs the right to sue *galleries and museums* for the return of such artwork until 2010, free from any statute of limitations. *See* Cal.Civ.Proc.Code § 354.3. However, this exception does not apply to suits against individuals. In "[a]n action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property," a plaintiff must sue within three years. Cal.Civ.Proc.Code § 338(c). A newer version of the California law includes an explicit "discovery rule," which states that the statute begins

to run when the plaintiff was on notice of the property's whereabouts. However, the older version of the California law did not include a "discovery rule." The parties dispute whether a discovery rule applies to this case, though both agree that the Court should apply the old law given that Taylor bought the painting in 1963.

a. The Discovery Rule Does Not Apply to this Case

In *Naftzger v. American Numismatic Society*, one California Court of Appeal held that there was an implied discovery rule in the old statute. 42 Cal.App.4th 421, 49 Cal.Rptr.2d 784 (1996). However, in *Society of California Pioneers v. Baker* another Court of Appeal disagreed. 43 Cal.App.4th 774, 783, 50 Cal.Rptr.2d 865 (1996). The California Supreme Court has not resolved the conflict.

As the *California Pioneers* Court notes, the *Naftzger* Court failed to address California precedent that rejected the application of a discovery rule. *California Pioneers*, 43 Cal.App.4th at 780-83, 50 Cal.Rptr.2d 865. This precedent establishes that the statute of limitations begins to run against a subsequent purchaser of stolen property at the time the subsequent purchaser obtains the property. *Id.* Thus, in this case, the statute of limitations began to run in 1963. It has long since expired.

b. Application of the Discovery Rule

Even if the California courts would apply a discovery rule to this case, Plaintiffs' Complaint does not state facts

sufficient to survive the motion to dismiss. "The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action." *O'Keefe v. Snyder*, 83 N.J. 478, 491, 416 A.2d 862 (1980).

Plaintiffs' own Complaint establishes several key facts: (1) the world knew of Mauthner's prior ownership of the painting for years; (2) Mauthner was aware that the painting was lost or stolen; and (3) Taylor's purchase and ownership of the painting was common knowledge and easily discoverable. The facts establish that Plaintiffs, "by exercise of reasonable diligence," should have discovered Taylor's ownership in 1963. *O'Keefe*, 83 N.J. at 491, 416 A.2d 862. The Complaint fails to allege any diligence on Plaintiffs part, much less any reasonable diligence. Thus, even if the discovery rule applied to this case, Plaintiffs have still failed to state a claim.

Therefore, the Court dismisses Plaintiffs' claims, numbered nine through thirteen, for claims of conversion, replevin, constructive trust, and restitution, as barred by the California statute of limitations.

3. English Law

Taylor asserts that the California courts would apply 1963 English law to this case because the painting was bought in England. Under that law, Taylor claims that Plaintiffs' suit is time-barred.

The Court need not reach the merits of Taylor's choice-of-law argument at this time. Taylor relies on declaration evidence that may or may not be contested to establish what the result would be in this case under English law. However, a motion to dismiss for failure to state a claim is judged on the pleadings, not declarations such as Taylor has provided to the Court. Moreover, the California statute of limitations bars Plaintiffs' claims.

B. Plaintiffs' Non-Traditional Causes of Action

Plaintiffs have stated several non-traditional causes of action. No court has ever found valid the causes of action that Plaintiffs claim in their Complaint. For the following reasons, the Court finds that Plaintiffs' non-traditional claims are invalid.

1. Claims Arising Out of Federal Law

Federal courts are reluctant to create a new cause of action that Congress did not explicitly create through legislative action. *See United States v. Gilman*, 347 U.S. 507, 74 S.Ct. 695, 98 L.Ed. 898 (1954); *Wheeldin v. Wheeler*, 373 U.S. 647, 651, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963). The courts will only create a new cause of action where absolutely necessary in order to effectuate Congress's intent. *See, e.g., Cannon v. University of Chicago*, 441 U.S. 677, 688, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979); *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964).

The Supreme Court's methodology on how to best determine a Congressional intent to create a cause of action

has shifted over the past thirty years, with a trend against finding new causes of action. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 6.3.3 (4th ed.2003). Under the older approach, the Supreme Court looked to four factors: whether the Plaintiff is a member of a class envisioned by Congress, whether there is any indication of Congressional intent, whether implying a cause of action is consistent with the overall statutory scheme, and whether the cause of action is one traditionally left to state law. *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Under the current approach, the courts create a private right of action "only if there is affirmative evidence of Congress's intent to create a private right of action." Chemerinsky at 385 (citing *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)). The courts also presume that Congress is well aware of this philosophy of judicial restraint, and therefore would clearly enunciate an intent to create a private right of action when that desire exists. *See Karahalios v. Nat'l Federation of Federal Employees*, 489 U.S. 527, 109 S.Ct. 1282, 103 L.Ed.2d 539 (1989).

Here, under any Supreme Court methodology, the Congressional Record does not indicate an intent to create a private cause of action. Rather, it indicates a Congressional intent to encourage governments to aid in the restitution of property through currently existing laws. Plaintiffs completely fail to address the fourth Cort factor. This factor makes it clear that courts should not create a new federal law where a state law already exists. Here, California law already provides for conversion and specific recovery.

Therefore, the Court finds that Plaintiffs claims, numbered one through five, for causes of action arising out of federal law, are invalid and are dismissed.

2. Claims Arising Out of the California Legislature's Findings and Declarations

Plaintiffs also ask the Court to create a new California claim that arises out of the California legislatures findings and declarations. No California court has created a special claim for the conversion of property in the manner proposed by Plaintiffs. As a federal court of limited jurisdiction, this Court is particularly reluctant to create a new California state cause of action, particularly one that would contradict the established California statute of limitations.

Therefore, the Court dismisses Plaintiffs' claims, numbered six through nine, for causes of action arising out of the findings and declarations of the California legislature.

V. CONCLUSION

In light of the foregoing, Taylor's motion to dismiss is granted in its entirety.

IT IS SO ORDERED.

APPENDIX C — HOLOCAUST VICTIMS REDRESS ACT

PL 105-158, February 13, 1998, 112 Stat 15

HOLOCAUST VICTIMS REDRESS ACT

TITLE II—WORKS OF ART

Sec. 201. FINDINGS.

Congress finds as follows:

(1) Established pre-World War II principles of international law, as enunciated in Articles 47 and 56 of the Regulations annexed to the 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, prohibited pillage and the seizure of works of art.

(2) In the years since World War II, international sanctions against confiscation of works of art have been amplified through such conventions as the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which forbids the illegal export of art work and calls for its earliest possible restitution to its rightful owner.

(3) In defiance of the 1907 Hague Convention, the Nazis extorted and looted art from individuals and institutions in countries it occupied during World War II and used such booty to help finance their war of aggression.

(4) The Nazis' policy of looting art was a critical element and incentive in their campaign of genocide against

individuals of Jewish and other religious and cultural heritage and, in this context, the Holocaust, while standing as a civil war against defined individuals and civilized values, must be considered a fundamental aspect of the world war unleashed on the continent.

(5) Hence, the same international legal principles applied among states should be applied to art and other assets stolen from victims of the Holocaust.

(6) In the aftermath of the war, art and other assets were transferred from territory previously controlled by the Nazis to the Union of Soviet Socialist Republics, much of which has not been returned to rightful owners.

Sec. 202. SENSE OF THE CONGRESS REGARDING RESTITUTION OF PRIVATE PROPERTY, SUCH AS WORKS OF ART.

It is the sense of the Congress that consistent with the 1907 Hague Convention, all governments should undertake good faith efforts to facilitate the return of private and public property, such as works of art, to the rightful owners in cases where assets were confiscated from the claimant during the period of Nazi rule and there is reasonable proof that the claimant is the rightful owner.

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U.S. HOLOCAUST ASSETS COMMISSION ACT OF 1998

An Act to establish a commission to examine issues pertaining to the disposition of Holocaust-era assets in the United States before, during, and after World War II, and to make recommendations to the President on further action, and for other purposes.

(a) ESTABLISHMENT.—There is established a Presidential Commission, to be known as the "Presidential Advisory Commission on Holocaust Assets in the United States" (hereafter in this Act referred to as the "Commission').

SEC. 3. DUTIES OF THE COMMISSION.

(a) ORIGINAL RESEARCH.—

(1) IN GENERAL.—Except as otherwise provided in paragraph (3), the Commission shall conduct a thorough study and develop a historical record of the collection and disposition of the assets described in paragraph (2), if such assets came into the possession or control of the Federal Government, including the Board of Governors of the Federal Reserve System and any Federal reserve bank, at any time after January 30, 1933—

(A) after having been obtained from victims of the Holocaust by, on behalf of, or under authority of a government referred to in subsection (c);

(B) because such assets were left unclaimed as the result of actions taken by, on behalf of, or under authority of a government referred to in subsection (c); or

(C) in the case of assets consisting of gold bullion, monetary gold, or similar assets, after such assets had been obtained by the Nazi government of Germany from governmental institutions in any area occupied by the military forces of the Nazi government of Germany.

(2) TYPES OF ASSETS.—Assets described in this paragraph include—

. . .

(G) works of art; and

(H) books, manuscripts, and religious objects.

* * *

(3) COORDINATION OF ACTIVITIES.—In carrying out its duties under paragraph (1), the Commission shall, to the maximum extent practicable, coordinate its activities with, and not duplicate similar activities already being undertaken by, private individuals, private entities, or government entities, whether domestic or foreign.

* * *

SEC. 9. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated not more than $3,500,000, in total, for the interagency funding of activities of the Commission under this Act for fiscal years 1998, 1999, and 2000, of which, notwithstanding section 1346 of title

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31, United States Code, and section 611 of the Treasury and General Government Appropriations Act, 1998, $537,000 shall be made available in equal amounts from funds made available for fiscal year 1998 to the Departments of Justice, State, and the Army that are otherwise unobligated. Funds made available to the Commission pursuant to this section shall remain available for obligation until December 31, 1999.

NAZI WAR CRIMES DISCLOSURE ACT

. . .

SEC. 3. REQUIREMENT OF DISCLOSURE OF RECORDS REGARDING PERSONS WHO COMMITTED NAZI WAR CRIMES.

* * *

(a) NAZI WAR CRIMINAL RECORDS.—For purposes of this Act, the term "Nazi war criminal records" means classified records or portions of records that—

(1) pertain to any person with respect to whom the United States Government, in its sole discretion, has grounds to believe ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

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(A) the Nazi government of Germany;

(B) any government in any area occupied by the military forces of the Nazi government of Germany;

(C) any government established with the assistance or cooperation of the Nazi government of Germany; or

(D) any government which was an ally of the Nazi government of Germany; or

(2) pertain to any transaction as to which the United States Government, in its sole discretion, has grounds to believe—

(A) involved assets taken from persecuted persons during the period beginning on March 23, 1933, and ending on May 8, 1945, by, under the direction of, on behalf of, or under authority granted by the Nazi government of Germany or any nation then allied with that government; and

(B) such transaction was completed without the assent of the owners of those assets or their heirs or assigns or other legitimate representatives.

(b) RELEASE OF RECORDS.—

(1) IN GENERAL.—Subject to paragraphs (2), (3), and (4), the Nazi War Criminal Records Interagency Working Group shall release in their entirety Nazi war criminal records that are described in subsection (a).

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SEC. 4. EXPEDITED PROCESSING OF FOIA REQUESTS FOR NAZI WAR CRIMINAL RECORDS.

(a) EXPEDITED PROCESSING.—For purposes of expedited processing under section 552(a)(6)(E) of title 5, United States Code, any requester of a Nazi war criminal record shall be deemed to have a compelling need for such record.

(b) REQUESTER.—For purposes of this section, the term "requester" means any person who was persecuted in the manner described under section 3(a)(1) of this Act who requests a Nazi war criminal record.

CALIFORNIA CIVIL PROCEDURE CODE 338(c)

335. The periods prescribed for the commencement of actions other than for the recovery of real property, are as follows:

. . .

338. Within three years:

. . .

(c) An action for taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property. The cause of action in the case of theft, as defined in Section 484 of the Penal Code, of any article of historical, interpretive, scientific, or artistic significance is not deemed to have accrued until the discovery of the

whereabouts of the article by the aggrieved party, his or her agent, or the law enforcement agency that originally investigated the theft.

JANUARY 7, 2002

An act to add Section 354.3 to the Code of Civil Procedure, relating to limitation of actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1758, Nakano. Limitation of actions: Holocaust-era artwork.

Existing law authorizes actions for the taking, detaining, or injuring of any good or chattel, or for the specific recovery of personal property to be commenced within 3 years. Existing law authorizes actions for the theft of any article of historical, interpretive, scientific, or artistic significance to be commenced within 3 years of the discovery of the article by various entities, as defined.

This bill would authorize any owner, or heir or beneficiary of the owner, of Holocaust-era artwork, as defined, to bring an action in superior court to recover that artwork from any museum or gallery. This bill would provide that any action brought under these provisions may not be dismissed for failure to comply with the applicable statute of limitation, provided the action is commenced on or before December 31, 2010.

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SECTION 1. The Legislature finds and declares the following:

(a) In addition to the many atrocities that befell the victims of the Nazi regime, treasured pieces of artwork were wrongfully taken.

(b) Thousands of victims of Nazi persecution, and the heirs of victims of Nazi persecution, are residents of the State of California. Many of these victims and descendants are investigating the whereabouts of artwork that rightfully belonged to their families.

(c) California has a moral and public policy interest in assuring that its residents and citizens are given a reasonable opportunity to commence an action in court for those pieces of artwork now located in museums and galleries.

(d) Museums are committed to resolving claims for Holocaust-era artwork in an amicable and timely manner, and to undertaking every effort to conduct thorough provenance research to identify artwork that may have been stolen during the Holocaust Era.

(e) Currently, an individual has three years, after discovering the whereabouts of the artwork, to commence an action in court.

(f) Due to the unique circumstances surrounding the theft of Holocaust-era artwork, commencement of an action requires detailed investigation in several countries, involving numerous historical documents and the input of experts.

(g) In order to obtain all necessary data, investigating a prospective action may take several years.

(h) The current three-year statute of limitation, after discovery of the whereabouts of the artwork, is an insufficient amount of time to finance, investigate, and commence an action.

(i) To the extent that the enactment of this act will extend the statute of limitation, that extension of the limitation period is intended to be applied retroactively, irrespective of whether the claims were barred by any applicable statute of limitation under any other provision of law prior to the enactment of this act.

SEC. 2. Section 354.3 is added to the Code of Civil Procedure, to read:

354.3. (a) The following definitions govern the construction of this section:

(1) "Entity" means any museum or gallery that displays, exhibits, or sells any article of historical, interpretive, scientific, or artistic significance.

(2) "Holocaust-era artwork" means any article of artistic significance taken as a result of Nazi persecution during the period of 1929 to 1945, inclusive.

(b) Notwithstanding any other provision of law, any owner, or heir or beneficiary of an owner, of Holocaust-era artwork, may bring an action to recover Holocaust-era

artwork from any entity described in paragraph (1) of subdivision (a). Subject to Section 410.10, that action may be brought in a superior court of this state, which court shall have jurisdiction over that action until its completion or resolution. Section 361 does not apply to this section.

(c) Any action brought under this section shall not be dismissed for failure to comply with the applicable statute of limitation, if the action is commenced on or before December 31, 2010.

APPENDIX D — LAW NO. 59 RESTITUTION OF IDENTIFIABLE PROPERTY

MILITARY GOVERNMENT — GERMANY UNITED STATES AREA OF CONTROL

LAW NO. 59

RESTITUTION OF IDENTIFIABLE PROPERTY

PART I

GENERAL PROVISIONS

ARTICLE 1

Basic Principles

1. It shall be the purpose of this Law to effect to the largest extent possible the speedy restitution of identifiable property (tangible and intangible property and aggregates of tangible and intangible property) to persons who were wrongfully deprived of such property within the period from 30 January 1933 to 8 May 1945 for reasons of race, religion, nationality, ideology or political opposition to National Socialism. For the purpose of this Law deprivation of property for reasons of nationality shall not include measures which under recognized rules of international law are usually permissible against property of nationals of enemy countries.

2. Property shall be restored to its former owner or to his successor in interest in accordance with the provisions of this Law even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. Provisions of law for the protection of purchasers in good faith, which would defeat restitution, shall be disregarded except where this Law provides otherwise.

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ARTICLE 3

Presumption of Confiscation

1. It shall be presumed in favor of any claimant that the following transactions entered into between 30 January 1933 and 8 May 1945 constitute acts of confiscation within the meaning of Article 2:

a) Any transfer of relinquishment of property made during a period of persecution by any person who was directly exposed to persecutory measures on any of the grounds set forth in Article 1;

b) Any transfer or relinquishment of property made by a person who belonged to a class of persons which on any of the grounds set forth in Article 1 was to be eliminated in its entirety from the cultural and economic life of Germany by measures taken by the State or the NSDAP.

2. In the absence of other factors proving an act of confiscation within the meaning of Article 2, the presumptions set forth in paragraph 1 may be rebutted by showing that the transferor was paid a fair purchase price. Such evidence by itself shall not, however, rebut the presumptions if the transferor was denied the free right of disposal of the purchase price on any of the grounds set forth in Article 1.

3. A fair purchase price within the meaning of this Article shall mean the amount of money which a willing buyer would pay and a willing seller would take, taking into

consideration, in the case of a commercial enterprise, the normal good will which such enterprise would have in the hands of a person not subject to persecutory measures referred to in Article 1.

ARTICLE 4

Power of Avoidance

1. Any transaction entered into by a person belonging to a class referred to in Paragraph 1 b) of Article 3 within the period from 15 September 1935 (the date of the first Nuremberg laws) to 8 May 1945 may, because of the duress imposed on such class, be avoided by a claimant where such transaction involved the transfer or relinquishment of any property unless:

a) The transaction as such and with its essential terms would have taken place even in the absence of National Socialism, or

b) The transferee protected the property interests of the claimant (Article 7) or his predecessor in interest in an unusual manner and with substantial success, for example, by helping him in transferring his assets abroad or through similar assistance.

2. In determining under paragraph 1 a) whether the transaction would have taken place even in the absence of National Socialism, the fact that

the transferor himself offered to sell the property to the transferee, or

the transferor received a fair purchase price (see Article 3, paragraph 3) the free right of disposal of which was not denied him on any of the grounds set forth in Article 1,

shall be considered by the Restitution Authority together with all other facts, but neither fact, either singly or in conjunction with the other, shall be sufficient to show that the transaction would have taken place even in the absence of National Socialism.

3. Similarly neither of these facts, either singly or in conjunction with the other, shall be sufficient to show that the claimant is estopped from exercising the power of avoidance by reason of his own previous conduct or that of his predecessor in interest.

4. The term "claim for restitution" as used in this Law shall be deemed to include all claims based on the right to exercise the power of avoidance. The exercise of the power of avoidance shall have the effect that the property transferred or relinquished pursuant to the voided transaction shall for the purposes of this Law be deemed to be confiscated property.

5. The filing of a claim for restitution shall, whether or not it is specifically stated, be deemed to be an exercise of the right of avoidance on behalf of the person entitled to exercise such right.

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ARTICLE 14

Persons Liable to Make Restitution

The person liable to make restitution (hereinafter referred to as restitutor), within the meaning of this Law, is the present possessor of confiscated tangible property or the present holder of a confiscated intangible interest, or of an aggregate of tangible and intangible property.

ARTICLE 19

Protection of Ordinary and Usual Business Transactions

Except as provided in Articles 20 and 21, tangible personal property shall not be subject to restitution if the present owner or his predecessor in interest acquired it in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property. However, the provisions of this Article shall not apply to religious objects or to property which has been acquired from private ownership if such property is an object of unusual artistic, scientific, or sentimental personal value, or was acquired at an auction, or at a private sale in an establishment engaged to a considerable extent in the business of disposing of confiscated property.